FEBRUARY 21, 2019 | DISCRIMINATION, HARASSMENT & RETALIATION

Court Ruling Further Clarifies ADA Website Accessibility Obligations

Over the past several years, we have written extensively about employers' obligations to make their websites accessible for individuals with visual, hearing and physical impairments. In the past, we have counseled employers who are considered a "place of public accommodation" (such as a hotel, restaurant, place of recreation, doctor's office, etc.) to at the very least do some due diligence to determine whether their websites are accessible for disabled users, so that those individuals can use and navigate those websites and/or purchase goods sold on the websites. (For more information about the developing law on this issue, check out our prior posts here and here.) Now, for the first time, a U.S. Court of Appeals has ruled on this issue and has confirmed that so long as there is a "nexus" between a company's website and a physical location (which is typically the case), a company must make its website accessible or risk significant legal exposure for violating the Americans with Disabilities Act ("ADA").

(As a reminder, although not the subject of this blog post, we have also written about a second consideration here regarding website accessibility that applies only to hotels and other places of lodging and currently is the subject of a tremendous amount of litigation. Specifically, the implementing regulations of Title III of the ADA require a hotel's website to provide information regarding various accessibility features at its property, so that a mobility impaired individual can determine whether he or she can navigate the public areas and guestrooms at the property.).

By way of background, Title III of the ADA prohibits discrimination against individuals on the basis of disability with regard to their participation and equal enjoyment in places of public accommodation. These types of issues historically have arisen in brick-and-mortar buildings and involve issues such as lack of accessible tables in restaurants, insufficient ramps, and inaccessible bathrooms, and Congress has never issued any regulations expanding the ADA's application to websites. Nonetheless, the Department of Justice ("DOJ") has emphasized that businesses should make websites accessible to disabled individuals by relying on a set of private industry standards developed by the World Wide Web Consortium known as the Web Content Accessibility Guidelines ("WCAG").

As a result, most of the law regarding website accessibility has resulted from court decisions. While at first courts ruled on both sides of the issue, the recent trend has been for courts to find that businesses are required to make their websites accessible, so long as the website has a significant "nexus" to a physical location. For

example, in June 2017, a federal district court in Florida found that a grocery store, Winn-Dixie, violated the ADA because its website denied a patron the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations that Winn-Dixie offers to its sighted customers. In requiring Winn-Dixie to make its website accessible, the court found that the website was regulated by Title III of the ADA because it is closely integrated with and had a nexus to the physical locations and is a "gateway" to the stores.

Several months later, in *Andrews v. Blick Art Materials, LLC*, a federal district court in New York went even further than the *Winn Dixie* court in ruling that websites are places of public accommodation which people with disabilities have a substantive right to access. Indeed, the *Andrews* court concluded that *any* website which offers direct sale of goods or services is on its own a public accommodation, even if that website does not have a nexus to a physical location.

Now, for the first time, a U.S. Court of Appeals has ruled on this issue. In *Robles v. Domino's Pizza,* the plaintiff alleged that Domino's was discriminating against him by preventing him from being able to use the website in violation of the ADA because his screen-reading software was not compatible with Domino's website. On January 15, 2019, the Ninth Circuit issued its decision agreeing with the plaintiff and affirming the lower court's decision finding that the ADA applies to Domino's website. In particular, the Ninth Circuit held that Domino's violated Title III of the ADA because its website's incompatibility with screen reader software impedes access to the goods and services of its physical pizza franchises. In so holding, the Ninth Circuit rejected Domino's argument that the Justice Department's failure to offer formal guidance on the website's ADA status violated its Fifth Amendment right to due process. As a result, the Ninth Circuit has now become the first federal appeals court to embrace the "nexus" approach to website accessibility as set forth in the *Winn-Dixie* case. You can read the entire decision here.

This Ninth Circuit decision, coupled with the other recent federal court decisions on this issue (along with the DOJ's future issuance of regulations regarding website accessibility), should put companies on notice of the potential for significant legal exposure for website accessibility issues. Although this ruling technically only applies to employers in states governed by the Ninth Circuit (California, Oregon, Washington, Arizona, Nevada, Idaho, Montana, Alaska, and Hawaii), it confirms the trend that has been developing in courts nationwide the past several years. Thus, unless extremely unusual circumstances exist, employers should abide by this decision regardless of the state(s) in which they operate. Therefore, any retailer, hotel, hospitality company or other place of public accommodation that has not already done so should immediately begin testing its website's accessibility and then implement any changes that are necessary to improve accessibility. It is essential for companies to involve legal counsel in conducting such website accessibility tests and remediation efforts in order to preserve attorney-client privilege, so that the results of these accessibility tests are shielded from discovery and cannot get into the hands of a potential plaintiff. Companies should also consider creating and/or adopting a website accessibility policy that is consistent with the requirements set forth in the WCAG, and require training and compliance with those requirements.

As always, we will continue to keep you updated on additional developments in this constantly evolving area of the law.